

**IRG Redevelopment I, LLC
c/o Lowry Development Group
11100 Santa Monica Boulevard, Suite 1850
Los Angeles, California 90025**

November 23, 2015

Ms. Tracie M. White, P.E., Unit Leader
Federal Facilities Remediation & Restoration Unit
Hazardous Waste Management Division
Colorado Department of Public Health and Environment
HMWMD-FF-B2
4300 Cherry Creek Drive South
Denver, CO 80246-1530
tracie.white@state.co.us

Mr. Curtis Stovall, P.E., Work Leader
Solid Waste Permitting Unit
Hazardous Waste Management Division
Colorado Department of Public Health and Environment
HMWMD-B2
4300 Cherry Creek Drive South
Denver, CO 80246-1530
curtis.stovall@state.co.us

Via Regular and Electronic Mail

Re: Former Lowry Air Force Base OU2 Landfill
- Application for Approval of Modification of Environmental Covenant
- Approval of Modification to Deed Restrictive Covenants
- Execution of Consent Agreement
- Approval to Implement Work Plans

Dear Ms. White and Mr. Stovall:

This letter seeks to resolve the years-long impasse between the Colorado Department of Public Health and Environment (“Department” or “CDPHE”) and the United States Air Force (Air Force”) regarding the Lowry Vista Project (“Project”) located on Operable Unit 2 (“OU2” or “Landfill”) - the former Lowry Air Force Base landfill. Despite IRG Redevelopment I, LLC’s (“IRGI”) repeated and express willingness to undertake studies, investigations and to provide financial assurances to move the Project forward, this governmental impasse has effectively halted development of the Project.

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Colorado Department of Public Health and Environment
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To resolve this unfortunate and costly impasse, IRGI, as the owner of the Landfill, hereby submits this formal application to modify relevant provisions of the Environmental Covenant dated January 4, 2006.

IRGI requests that the Department review and approve this application and the supporting information pursuant to C.R.S. §25-15-319(h). The Department has sixty (60) days from receipt of this application to make a determination regarding the Modified EC and any such determination is subject to appeal. C.R.S. § 25-15-321(6) and (7), respectively.

IRGI has notified the United States Air Force (“Air Force”) and other interested persons of this application as required by C.R.S. §25-15-321(5). The AF Letter also requests approval of the Modified EC.

IRGI has also requested that the Air Force approve a modification of the Restrictive Covenants contained in the 2006 Colorado Deed and hereby requests the Department’s approval of same. (See **Attachment A**, Letter from Peter Goffstein to Dr. Stephen TerMaath, November 23, 2015, “**AF Letter**”).

IRGI also requests that the Department sign the Consent Agreement, previously forwarded to CDPHE on August 11, 2015. (See **Attachment B**, Consent Agreement, executed by IRGI on July 29, 2015, “**CA**”).

Approval of the Modified EC and Modified RC by CDPHE and the Air Force will remove the legal hurdles that the Department claims prevent it from using its lawful authority and responsibility to oversee the redevelopment of the Landfill. These approvals will also result in a financial assurances to the Air Force (and, by extension, CDPHE) in the event of the discovery of unknown conditions at the Landfill during and post-development. In addition, these approvals will allow IRGI to move forward with the Work Plans and development of the Project.

We look forward to your earliest response to the application and requests in this letter

I. Background

A. Work Plans and Conditional Approvals

For nearly three years, IRGI has sought approval from the Department and the Air Force to conduct limited pre-development Work Plans. (AF Letter §I.A.) These include the performance of a Revised Plan to Stockpile Soil on the OU2 landfill cap (“SSP”), a Lowry Vista Cap Penetration Plan (“CPP”) and a Field Investigation Work Plan (“FIWP”) (collectively “Work Plans”).

In December, 2013, CDPHE conditionally approved these Work Plans. (See, **Attachment C**, SSP; **Attachment D**, CCP; **Attachment E**, FIWP, respectively, **conditional approval letters**). The Department, however, imposed several conditions on its approval, including,

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among other things, that IRGI sign the Consent Agreement and a Modified Environmental Covenant, as well as provide certain financial assurances. IRGI has signed the Consent Agreement, is proposing a Modified EC, and is prepared to provide the financial assurances approved by the Department.

In addition to the IRGI conditions, CPDHE imposed three conditions requiring Air Force actions before IRGI could proceed with these Work Plans. The Air Force Conditions are:

First, that the Air Force provide “written confirmation” that the Work Plans are “consistent with the ... Restrictive Covenants in the Deed;”

Second, that the Air Force provide “written confirmation” that the activities proposed under the Work Plans “will not affect the Air Force’s warranties in the Deed;” and,

Third, that the Air Force provide “written approval” of the Work Plans before IRGI may commence the work.

While IRGI does not necessarily agree that the Air Force Conditions are legally required, we have made a good faith effort to obtain the requested approvals from the Air Force. The Air Force has responded that it has no requirement to, and will not, approve the Work Plans and will not provide the written confirmations requested by the Department.

This years-long impasse between the state and federal governments has, unfortunately, halted IRGI’s efforts to proceed with these limited, but important, environmental investigations and effectively halted IRGI’s plans to develop the Lowry Vista Project.

B. Environmental Covenant - Use Restrictions

The 2006 Deed was issued in conjunction with a recorded Environmental Covenant granted to the State of Colorado. (See **Attachment F**, Environmental Covenant, “EC;” see also **Attachment G**, Colorado Deed, “**Deed**” §VII.D.1)

The current land Use Restriction in the EC states: “*Unless the Covenant is modified in accordance with the State’s statute and regulations*, OU2 will only be used as open space/non-irrigated park following closure.” (EC§1.a, emphasis added.) In addition, the EC includes restrictions that limit activities that might impact the final cover and remedy on OU2. (EC §1.b)

Under the Deed,¹ the Air Force “recognizes that [IRGI] may change the [EC] in accordance with [Colorado’s] Environmental Covenant Statute including but not limited to providing for limited disturbance of the final cover of OU2.” (Deed §VII.D.2(b)). The Air Force “agrees to consider such changes set forth in the Environmental Covenant for its Restrictive

¹ The Deed was subsequently transferred to IRGI by Bargain and Sale Deed on January 19, 2006.

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Covenant.” (*Id.*) The Deed also provides that the Air Force is to be notified if IRGI requests a modification of the EC.² (Deed §VII.D.1)

C. Deed - Restrictive Covenants

The Deed includes a separate Restrictive Covenant associated with OU2 (“RC”). Under the RC, IRGI, as the owner, “shall not disturb the integrity of the final cover ... unless necessary to comply with the requirements in the regulations of the Colorado Department of Public Health and Environment.” (Deed §VII.D.2(b)).

IRGI may, however, “request that the Air Force approve a modification or termination of any of the Restrictive Covenants” and the Air Force is obligated to “review any submitted information and may request additional information.” (*Id.*) No modification of the RC is effective unless the Air Forces approves of same; provided, however, that such “approval shall not be unreasonably withheld or delayed.” (*Id.*)

D. Enforceable Agreement

The Enforceable Agreement between the Department and the Air Force includes the Air Force’s commitments that “all remedial action necessary to protect human health and the environment ...will be taken.” The EA allows the Department to enforce these commitments against the Air Force. (See, **Attachment H**, Enforceable Agreement, “**EA**”.)

The EA includes a provision that arguably requires the Department’s review and approval of the particular modification to the Deed RC’s sought by IRGI. (EA §III.F)

Critically, IRGI’s proposed Modified RC and Modified EC do not alter, in any way, the Air Force’s ultimate remedial obligations under the EA (or, for that matter, under CERCLA³); nor do the proposed changes modify in any way the Department’s ability to enforce the Air Force’s EA commitments.

II. Application for Modification of the Environmental Covenant

As stated above, IRGI is hereby submitting this letter application for the Department’s review and approval of modifications of the EC. This application is made pursuant to Colorado’s Environmental Covenant Statute (C.R.S. 25-15-317, *et seq.*) and the applicable provisions of the EC, Deed and EA. Concurrently with this application, IRGI has formally notified the Air Force of the Modified EC as required by the Deed.

² The AF Letter provides the required notification to the Air Force.

³ The Comprehensive Environmental Response Compensation and Liability Act, a/k/a, Superfund.

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IRGI's proposed modification to the land use provision of the EC states: "Unless this Environmental Covenant is modified in accordance with the State's statute and regulations, the Property (OU2) may be developed in accordance with land use and development plans approved by local governments with jurisdiction over the Property." (*See Attachment I "Modified EC," §1.a.*)

The Modified EC also includes provisions previously proposed by the Department that would allow IRGI to conduct investigation activities on OU2. These provisions are intended to allow the disturbance of the final cover and other components of the OU2 remedy, *where such activities are allowed and approved by CDPHE* pursuant to applicable laws and regulations. (Modified EC §§1.c. and d.).

If the Department determines that the proposal to modify the environmental covenant will ensure protection of human health and the environment, it *shall approve* the proposal. (C.R.S §25-15-319(h), emphasis added.)

A. Supporting Information – Modified EC

In support of its application, IRGI is submitting the following information to demonstrate that the Modified EC will protect human health and the environment. IRGI is prepared to meet, at the Department's earliest convenience, and discuss any additional information the Department believes it may need.

1. Benefits Memorandum

The modification to the Use Restrictions in the EC will allow development of the Lowry Vista Project. This Project, when completed, not only ensures protection of human health and the environment, it will reduce the risks inherent in the current undeveloped status of the Landfill. (*See, Attachment J, Memorandum from IRGI to Steve TerMaath, USAF, December 9, 2014 "Benefits Memorandum"*). The Benefits Memorandum is submitted in support of this application for a modification of the Use Restriction in the EC.

Development of Lowry Vista will essentially create "two impermeable caps over much of the surface area of the landfill," which will, in turn, reduce pathways from residual waste materials to the public. Moreover, once the Project is completed, long-term risks will be addressed with mitigation measures such as vapor barriers, no groundwater use, no surface ponding of water, and on-going monitoring. (Benefits Memorandum, pp. 2, 5.)

2. Work Plans

The Modified EC also includes provisions to allow IRGI to conduct investigation activities on OU2, such as those identified in the Work Plans. This modification is intended to restate the Department's existing oversight authority and to allow disturbance of the final cover

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and other components of the OU2 remedy without further Air Force approvals. (Modified EC §§1.c. and d.). IRGI is prepared to begin implementation of the Work Plans, which we believe will provide additional and confirming data that will ensure that development of the Lowry Vista Project will enhance protection of human health and environment.

3. Special District Taxing Authority For Environmental Matters

In addition, long-term operation and monitoring costs will be borne by the Lowry Vista Metro District, which has statutory authority to impose taxes to pay for environmental obligations related to development and future uses of the Landfill. (Benefits Memorandum §2) In short, the current remedy for OU2 will be significantly enhanced and improved by development of the Project and provide long-term protection of human health and environment. This information is submitted in support of the application to modify the EC.

4. Financial Assurances – Work Plans

As you know, the Department's approvals of the SSP and the FIWP included conditions for IRGI to provide financial assurances in the amount of \$395,000 or \$813,000 (depending on the volume of soil delivered to the Landfill) and \$32,000, respectively. The Department's approval of the CCP included a similar condition, with the precise amount to be determined. IRGI will provide the financial assurances for the SSP and the FIWP and discuss with the Department the amount for the CCP. These financial assurances provide additional protection of human health and the environment and must be considered by the Department when evaluating the application for the Modified EC.

5. Financial Assurances – Unknown Conditions

To further ensure protection of human health and the environment during development and post-development, over and above the Air Force's CERCLA §120 obligations (and over and above the Work Plan financial assurances), IRGI has prepared a financial assurance cost estimate. (See **Attachment K**, Letter from Burns & McDonnell to Peter Goffstein, IRGI, July 24, 2015, "**Assurance Letter**") The Assurance Letter has been provided to the Air Force with the AF Letter.

The Assurance Letter develops worst case scenarios that assume: (i) a "reasonable maximum likelihood" of discoveries of contaminants during, and post, development; and, (ii) that IRGI abandons the Project. Cost estimates are established for each of these worst case scenarios. Prior to beginning Project development, *and* once substantial development is complete, IRGI will submit to CDPHE and the Air Force financial instruments suitable to cover the cost estimates for each scenario.

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The Assurance Letter and IRGI's commitment to provide financial assurances are submitted to the Department in support of the application for the Modified EC and must be considered by the Department when evaluating the Modified EC.

III. Modification - Deed Restrictive Covenant

In addition, IRGI is formally requesting that the Air Force approve a modification of the Restrictive Covenant in the Deed. (*See Attachment L, "Modified RC"*).

Although the EA is somewhat ambiguous regarding the Department's review and approval of the specific Deed modification sought by IRGI,⁴ in the interests of transparency and cooperation in this matter, IRGI is requesting that the Department review and approve the Modified RC.

The Modified RC, if approved by the Air Force and CDPHE, expressly authorizes the Department to approve, *without further involvement of the Air Force*, work plans that may disturb the integrity of the final OU2 remedy, as long as such plans *are allowed and approved by CDPHE* pursuant to applicable laws and regulations. (Modified RC §VII.D.2(b)(i))

Note that this modification is similar to revisions in the Modified EC. (Modified EC §§1.c. and d.).

We believe that approval by the Air Force and CDPHE of the Modified RC, would address the Department's condition that the Work Plans would be "consistent" with the RC and obviate any need for the Air Force to approve the Work Plans or future work plans and activities.

IRGI believes that Air Force and Department approval of the Modified EC and RC will resolve the Department's first and third Air Force Conditions and remove these hurdles to development of the Project.

IV. Deed Warranties

With regard to the Department's second Air Force Condition, we note that the Deed essentially restates the law as set forth in CERCLA §120(h)(3)(A)(ii)(II), namely, that "any additional remedial action found to be necessary after the date of ...transfer shall be conducted by the [Air Force]." The Air Force's obligation to comply with CERCLA §120's warranty requirements are statutory and perpetual; these obligations cannot be obviated by the Air Force.

Although IRGI does not believe any further Air Force confirmation is necessary, it appears that the Air Force can readily satisfy the Department's second Air Force Condition by reaffirming the Air Forces obligation to comply with CERCLA §120. We have asked the Air Force to provide such written confirmation to the Department. (Air Force Letter §III.A.)

⁴ Enforceable Agreement, §III.F.

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In addition, as indicated above, IRGI is prepared to provide financial assurances to the Department and the Air Force, over and above the Air Force's CERCLA warranties, as an additional level of financial protection for the development of the Project. (Air Force Letter §III.B.) IRGI's supplemental financial assurances are an additional reason for the Department to resolve the second Air Force Condition.

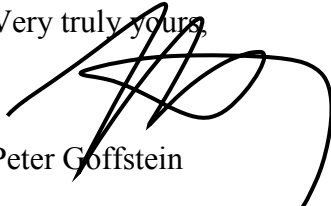
V. Conclusion

IRGI hereby formally requests that the Department:

- (i) Approve the Modified EC;
- (ii) Approve the Modified RC;
- (iii) Execute the Consent Agreement;
- (iv) Accept the Air Force's affirmation of its CERCLA §120 obligations to satisfy the second Air Force Condition; and,
- (iv) Approve the immediate implementation of the Work Plans.

Of course, IRGI is available at your earliest convenience to meet and discuss this application with you, your legal counsel and the Air Force.

Very truly yours,



Peter Goffstein

cc via email only:

Dr. Stephen TerMaath, USAF
Cynthia A. Stephens, Esq., USAF
Jennifer Robbins, Esq., Colorado Attorney General's Office
Dr. Wayne Doband, dr.ecolonomics
Ira Star, IRAMCo, LLC
Howard Kenison, Esq., Lindquist & Vennum, LLP